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Crime prevention and criminal justice

Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin

Report of the Secretary-General

Summary

The present report has been prepared by the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime, in response to General Assembly resolution 57/244 of 20 December 2002, complementing the previous report of the Secretary-General (A/57/158 and Add.1 and 2) with an additional response provided by Lebanon. The report highlights the progress made by the Ad Hoc Committee for the Negotiation of a Convention against Corruption regarding the issue of preventing and combating corrupt practices and the transfer of funds of illicit origin and the returning of such assets to the countries of origin. It also reflects briefly the content of the global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, which was submitted to the Ad Hoc Committee at its fourth session (A/AC.261/12), followed by conclusions and recommendations.

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I. Introduction

1. In its resolution 57/244 of 20 December 2002, the General Assembly, emphasizing the responsibility of Governments to adopt policies at the national and international levels aimed at preventing and combating corrupt practices, transfer of funds and assets of illicit origin and facilitating the return of such funds and assets to the countries of origin, encouraged all Governments to work for the return of such funds and assets to the countries of origin, after request and due process, and welcomed the actions at the national and international levels by some Governments in that regard; urged an early completion of the ongoing negotiation of a convention against corruption to allow for the adoption of the Convention by the General Assembly at its fifty-eighth session; called, while recognizing the importance of national measures, for further international cooperation in support of efforts by Governments to prevent and address the transfer of funds of illicit origin, as well as to return such funds and assets to the countries of origin; also called for all efforts to promote good public and corporate governance at all levels, which was essential for sustained economic growth, poverty eradication and sustainable development worldwide; and requested the Secretary-General to report to it on the matter at its fifty-eighth session.

II. National measures

2. It should be recalled that, pursuant to General Assembly resolution 55/188 of 20 December 2000, the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime submitted a report on prevention of corrupt practices and illegal transfer of funds to the Assembly at its fifty-sixth session (A/56/403 and Add.1). That report contained the responses provided by Member States and relevant bodies of the United Nations system regarding measures adopted to implement resolution 55/188, including action against corrupt practices and the issue of preventing and combating the transfer of funds of illicit origin and returning such funds. Twenty-nine countries and territories and two bodies of the United Nations system provided replies: Algeria, Bahamas, Bahrain, Bosnia and Herzegovina, Brazil, Cook Islands, Estonia, France, Greece, Guyana, India, Italy, Japan, Kuwait, Malaysia, Malta, Mauritius, New Zealand, Panama, Peru, Philippines, Spain, Switzerland, Syrian Arab Republic, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Zimbabwe and United Nations Development Programme and United Nations Conference on Trade and Development. Many responses included copies of national legislation and recent legal reforms in the area, the status of ratification of relevant treaties and a description of international or regional initiatives. The report also provided an analytical overview and specific recommendations concerning the return of illegally transferred funds to the countries of origin.

3. A further report (A/57/158 and Add.1 and 2) was submitted to the General Assembly at its fifty-seventh session in response to resolution 56/186 of 21 December 2001. The following 28 countries provided information on progress made in the implementation of the resolution or updated replies that had appeared in the previous report of the Secretary-General: Azerbaijan, Bolivia, Brazil, Bulgaria, Colombia, Croatia, Czech Republic, Germany, Greece, Haiti, Hungary, Jordan,

Mauritius, Mexico, Monaco, Myanmar, Oman, Pakistan, Poland, Republic of Korea, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey and Ukraine. The topics covered in the responses included national anti-corruption programmes, domestic legislation and reform plans, institutional arrangements and relevant international legal instruments ratified. Considering that national legislation on the subject in many parts of the world was inadequate and the question of the transfer of funds of illicit origin and the return of such funds had not been specifically regulated by any of the existing treaties, the report concluded that the forthcoming convention against corruption could make a significant contribution to the fight against corruption.

4. One additional response on progress made in the implementation of General Assembly resolution 56/186 has been received since the previous report, from Lebanon. In its response, the Government of Lebanon outlined its relevant legislation and penal policies, to be found primarily in the Penal Code, Law No. 154 on Illicit Enrichment, of 27 December 1999 and Law No. 318 on Combating Money-Laundering, of 20 April 2001.

5. The Penal Code established acts of corruption as offences liable to sanctions imposed on the perpetrator, instigator, participant and accessory. It also required the confiscation of movable and immovable property derived from such acts. Included among the acts of corruption were crimes of terrorism; crimes committed by criminal groups; crimes against public administration, especially breach of duty (bribery, trading in influence, embezzlement or abuse of position); the falsification of currency or official documents; the falsification of postage and fiscal stamps; forgery; theft; fraud; and all types of deceit and breach of trust.

6. Lebanon's Law No. 154 defined the following acts as illicit enrichment: enrichment by a public official, a judge or any partner or other person acting in the name of such an official, where the enrichment accrues through bribery, trading in influence, abuse of position or entrusted duty (arts. 351 and 366 of the Penal Code) or by any other means, even if such means did not otherwise constitute a criminal offence. Illicit enrichment also included enrichment of any kind by a public official, a judge or other physical or legal person if the enrichment accrued by some means that constituted an offence or violation of the law. The legislation applied both to direct and immediate benefits and to potential benefits. An investigating judge or competent court could order a provisional seizure of movable and immovable property of a defendant in such cases, subject to a final judicial determination to confiscate such assets. Bank secrecy did not apply in such cases.

7. Lebanon's Law No. 318, which defined and sanctioned money-laundering and provided powers of investigation in money-laundering cases, also applied to the illicit enrichment offences.

8. The Government of Lebanon noted that its earlier listing as a "non-cooperative country or territory" by the Financial Action Task Force on Money Laundering of the Organisation for Economic Cooperation and Development was rescinded by the Task Force on 21 June 2002 as a result of measures taken against money-laundering and related problems by Lebanon.

III. International initiatives

A. Entry into force of the United Nations Convention against Transnational Organized Crime

9. The United Nations Convention against Transnational Organized Crime, adopted by the General Assembly in its resolution 55/25 of 15 November 2000, was ratified by the fortieth State on 1 July 2003 and, in accordance with its article 38, will enter into force on 29 September 2003. The Convention includes comprehensive measures for dealing with transnational organized crime, including offences relating to corruption and money-laundering, and requirements for international cooperation in the seizure and confiscation of any property or assets that are proceeds of an offence covered by the Convention, derive from such proceeds or are assets equivalent to such proceeds. It is expected that, in implementing the Convention, States will take action at the national level and enter into cooperative arrangements at the bilateral and multilateral levels to put those measures into effect.

B. Ad Hoc Committee for the Negotiation of a Convention against Corruption

10. During 2003, the Ad Hoc Committee for the Negotiation of a Convention against Corruption, established by the General Assembly in its resolution 55/61 of 4 December 2000, continued to make progress in its work. By June 2003, five sessions had been held, during which the first two readings of the draft convention had been completed and the third started. It is hoped that the Ad Hoc Committee will be able to complete its work at the sixth session, to be held from 21 July to 8 August 2003, so that the new instrument can be submitted to the General Assembly for adoption at its fifty-eighth session. Preventive measures against corruption and measures against the transfer of funds of illicit origin are important chapters of the new convention.

11. In its resolution 2001/13 of 24 July 2001, the Economic and Social Council requested the Secretary-General to prepare for the Ad Hoc Committee a global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, and its impact on economic, social and political progress, in particular in developing countries, and to include in his study innovative ideas regarding appropriate ways and means enabling the States concerned to obtain access to information on the whereabouts of funds belonging to them and to recover such funds. The study was submitted to the Ad Hoc Committee for consideration at its fourth session (A/AC.261/12).

C. Global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption

12. The study incorporated information from the presentations of experts as well as from the outcomes of the discussion at a one-day technical workshop on asset recovery, held on 21 June 2002, during the second session of the Ad Hoc

Committee. The study examined the problems associated with preventing and combating corruption and the transfer of assets of illicit origin, in particular in cases of large-scale corruption. It noted the substantial amounts of money involved and the economic hardships of countries that had been victims of such corruption and were not able to recover the proceeds. It noted that amounts transferred by former leaders and high officials were frequently believed to be in the hundreds of millions of dollars, and in some cases in the billions of dollars, and that the vast majority of such amounts were believed to derive from acts of corruption. In such cases, the adverse effects of the corruption were aggravated by the removal of assets from national economies and further aggravated by the inability to recover those assets. It examined in detail the specific obstacles faced by countries seeking recovery, including evidentiary and procedural problems, difficulties generated by the laundering or concealment of assets or their criminal origins and the possible reluctance of other States to return assets to new Governments in the face of any remaining concerns about stability or freedom from further corruption. It also examined problems arising after the recovery of assets, including competing claims from other countries and the problem of identifying individual victims or parties beneficially entitled to assets in the event they were recovered.

1. Obstacles to recovery actions

13. The global study identified several obstacles to recovery actions, as outlined below.

(a) Anonymity of transactions impeding the tracing of funds and the prevention of further transfers

14. A major problem in all money-laundering cases is the rapid and relatively anonymous movement of funds, a problem that has worsened as Internet and electronic commerce technologies have created new ways to transfer funds and more effective technical means of protecting the privacy and anonymity of those involved. Apart from technological developments, concerns have also arisen from the use of more traditional means of assuring anonymity, concealing origin or defeating tracing efforts. These have included financial services, such as blind trusts and asset protection trusts. Institutions have in many cases also given preferential treatment to individuals of high net worth, further protecting privacy and anonymity. Obstacles were also created in some cases by the use of intermediaries unknown to authorities to conduct transactions and hold accounts or assets. Further concerns were raised by legal and cultural values in the financial services sector that favoured bank secrecy and a reluctance to report suspicious transactions or otherwise assist investigators.

(b) Lack of technical expertise and resources

15. The successful recovery of assets required a substantial degree of expertise and commitment of resources, in particular when the assets in question had been concealed by persons knowledgeable in money-laundering, which often occurred in major corruption cases. The ability to act quickly also outstripped the abilities or resources of countries seeking return in some cases, in particular where both expertise and resources had previously been depleted by the very offenders whose assets were now being traced.

(c) Lack of harmonization and cooperation

16. Further obstacles were created by the diversity of approaches taken by different legal systems with respect to matters such as jurisdiction, the relationship between criminal prosecutions and recovery proceedings and whether civil proceedings could be used in the various States involved. Within the field of criminal law, the underlying offences of corruption also varied, as did the procedural and evidentiary rules for the prosecution of offenders and the recovery of proceeds. Countries seeking the return of assets, whose law enforcement, prosecutorial and judicial functions had been weakened by previous corruption and other problems, often faced severe challenges in meeting the high evidentiary and procedural standards required in the laws of the large, developed countries where substantial proceeds were most likely to be concealed. A further evidentiary issue that often arose was whether proceeds could be traced, seized and forfeited using civil proceedings or whether criminal proceedings and a higher burden of proof were required. Generally, States faced a choice between obtaining a domestic judgement ordering forfeiture of the assets and then seeking to have that judgement recognized in the jurisdiction where the assets were found or bringing initial proceedings in that jurisdiction, which often had major resource implications for the State that had to conduct the bulk of the proceedings.

(d) Problems in the prosecution and conviction of offenders as a preliminary step to recovery

17. The study also noted that, in most cases, the recovery of assets could not be sought until there was a criminal conviction or some other proceeding that established to a criminal standard of proof that offences had been committed and that the assets being sought were proceeds or derived from the proceeds of such offences. Given that major corruption cases often involved officials at the highest levels, cases arose in which sovereign immunities were raised as a defence. In other cases, laws had been suspended or manipulated to ensure that the corrupt conduct of senior officials was not defined or subject to sanction as a criminal offence. Further problems arose from the past, and in some cases present, efforts of suspects to destroy evidence or otherwise obstruct the criminal justice process.

2. Problems arising after the recovery of assets

18. Even in cases where assets were successfully located, frozen, seized and confiscated by the country in which they were found, further problems often arose with the return and disposal of such assets. The global study identified a number of such problems.

(a) Concerns about the motivation behind recovery efforts

19. Efforts to obtain return of recovered illicit funds or assets were in some cases frustrated or delayed by concerns about the motives of the requesting State. Given the nature of the targets of some investigations, grounds might exist for suspecting that investigation and recovery efforts were politically motivated. Requested countries might also in some cases have doubts about whether the present regime requesting return was itself free from corruption and how the funds would be used if returned.

(b) Competing claims within and across States

20. The difficulty of tracing and identifying assets and the intermingling of proceeds with other assets or with the proceeds of other crimes could lead to situations where more than one country was seeking the recovery of the same assets. Assets embezzled from foreign aid projects, for example, might be sought by both the donor and recipient of the original aid donation. Further, legal actions might be brought in the requesting or requested State by individuals or companies seeking compensation for the effects of corruption or other criminal offences, leading to scenarios in which competing claims might have to be resolved, either before or after the assets were returned.

IV. Conclusions and recommendations

21. As noted above, considerable attention has been given to the problem of the transfer of funds of illicit origin and the return of such funds. As emphasized in the last report of the Secretary-General (A/57/158 and Add.1 and 2), the analysis of the measures taken by Member States as well as by the United Nations system and relevant organizations confirmed the high priority attached by the international community to the fight against corruption, including the problem of the transfer of funds of illicit origin and the return of such funds. The global study suggested several possibilities for consideration to remove the impediments in recovery and return of such funds, as well as possible future actions to deal with the problem.

A. Recovery of funds

1. Transparency and measures to combat money-laundering

22. In order to effectively trace and confiscate funds of illicit origin and to prevent further laundering before confiscation, it is essential to take precautions against money-laundering and to clear away obstacles to tracing and identification that remain within the financial services sector. States are encouraged to require financial institutions to properly implement comprehensive due diligence programmes, including "know-your-customer" principles, that could facilitate transparency and prevent the placement of illicit funds. States should also consider expanding existing anti-money-laundering provisions to include foreign corruption as a predicate offence, thereby triggering other proactive requirements and reactive measures. In including corruption as a predicate offence or offences, clarity of definition is needed and this may include expanding or enhancing existing definitions or offences to ensure that the full range of major corruption activities that give rise to proceeds are adequately addressed.

2. Potential funding resources

23. A major obstacle to States seeking recovery is the lack of the substantial financial resources needed to conduct investigations and foreign legal proceedings. The study suggested four potential sources for the financing of recovery actions. Firstly, where legally acceptable, law firms and investigators

could be allowed to work on the basis of fees that were contingent upon the ultimate recovery of the assets. A second means might be to allow private interests to conduct the necessary legal proceedings subject to an arrangement under which any recovery would be shared with the State according to an established formula. A third is the use of loans, in particular from aid donors concerned both about combating corruption and the sustainable development or restoration of the country seeking recovery. The fourth is to seek reimbursement based on statutory, litigation or other grounds, against financial institutions that, having a duty to identify or block suspicious transactions, fail to do so.

3. Harmonization

24. Given the underlying differences of legal systems, efforts to harmonize relevant provisions and practices are seen as an important aspect in simplifying recovery actions. Generally, substantive, evidentiary and procedural harmonization is seen as desirable, bearing in mind the need to guarantee basic human rights and procedural safeguards and the transnational nature of proceedings.

4. Cooperation

25. Effective international cooperation is also seen as critical. In that regard, the global study recommended several measures at the national, bilateral and multilateral levels. At the national level, it is suggested that States consider enacting provisions to allow the initiation by the requesting State of legal actions in the courts of the requested State relating to the proceeds of corruption when the requesting party can either establish an ownership interest in the assets or present a final, valid judgement from its own courts. The adoption of legal measures to permit courts to enforce a valid final judgement from a foreign jurisdiction ordering the confiscation of the proceeds of corruption is also recommended. In addition to such legal measures, designating government bodies to handle requests for assistance that facilitate mutual assistance, as well as adopting measures that allow the forwarding of information on funds of illicit origin to another State, deserve consideration. Bilateral cooperation efforts may also enhance recovery actions; the utilization of modern communication technology, such as videoconferencing, can cut back the workloads of both requesting and requested States. In order to avoid creating feelings of inequality between requesting and requested States, equitable sharing of the labour required in recovery actions can become a key factor for success. With the appropriate support from Member States, the United Nations could also assume an enhanced role by setting up a technical assistance clearing house to assist multinational recovery actions. This could ensure the flow of necessary information and mutual understanding of requirements in both requesting and requested States.

B. Return of funds

1. Clear and consistent rules for the allocation of recovered funds

26. In order to solve the competing claims for the recovered funds and assets, the global study suggested establishing clear and consistent rules for the priorities to be applied to the allocation of recovered funds and assets. In establishing such rules, consideration should be given to: (a) compensation to the victims of crime, (b) support for anti-corruption programmes; and (c) meeting expenses that might have been incurred by the State in which the funds or assets were located. In addition, allocating a certain amount of recovered funds to servicing national debt and enhancing good governance would ensure the appropriate use of recovered funds.

2. Appointment of an independent custodian to solve conflicting claims

27. Consideration should be given to the establishment of asset forfeiture funds to hold and disburse assets in order to help resolve competing claims for recovered funds. Such a mechanism would allow for an informed and impartial individual or tribunal to sort through the often conflicting claims made against the recovered assets.

3. Asset-sharing with cooperative States

28. Arrangements for sharing recovered funds with States that had made possible or substantially facilitated the forfeiture would offer a financial incentive to States to work together towards successful recovery, regardless of where the assets were located or which jurisdiction would ultimately enforce the forfeiture order. As a general rule, the amount of shared funds would reflect the proportional contribution of the State related to the assistance provided by other law enforcement participants. However, in cases clearly involving public funds, consideration could be given to the possibility of maximizing recovery.

C. Prevention

1. National capacity-building

29. The establishment of a financial intelligence unit would help prevent the transfer of illicit wealth by receiving and reviewing suspicious transactions, analysing financial information and exchanging information. In addition, consideration should be given to enforcing due diligence requirements more actively. When planning and implementing due diligence programmes, the following three dimensions should be considered: (a) the application of enhanced diligence to unusual financial transactions; (b) the creation and maintenance of client identification files and records on unusual transactions; and (c) the obligation to report suspicious transactions to competent authorities. In that regard, the global study also recommended the development of early warning mechanisms as part of due diligence programmes. Assisting countries without adequate resources and technical expertise would be also

needed and consideration should be given to the key leadership role that the United Nations could play in capacity-building efforts.

2. Enhancement of the role of the United Nations

30. In addition to the possible role that the United Nations could play in providing technical assistance mentioned above, consideration could be also given to mandating the United Nations to act as a repository for information on due diligence and on suspicious transactions. For example, the International Money-Laundering Information Network (IMoLIN) database, created by the Global Programme against Money-Laundering of the United Nations Office on Drugs and Crime, has already provided the basis for the construction of a secure web site through which Member States could share information on due diligence and suspicious transactions. Over the long term, the United Nations may be in a position to extract information about corruption cases to create a general body of knowledge available to all interested States.

31. It is expected that the spirit of cooperation and compromise within the Ad Hoc Committee for the Negotiation of a Convention against Corruption will result in an agreement on the various provisions on the subject. As indicated in the previous report of the Secretary-General, the question of the transfer of funds of illicit origin and the return of funds has not been specifically regulated by any of the existing international legal instruments against corruption. The successful completion of the negotiation of the future convention will not only constitute the first step towards mobilization of international efforts to tackle this complex issue, but will also have a positive impact on the future promotion of the ratification of the convention and implementation of its provisions.